

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

PAUL RECKTENWALD, et al.,

Plaintiffs,

vs.

DR. STEVEN MACARTHUR, et al.,

Defendants.

3:04-CV-00690-ECR (RAM)

**REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE**

This Report and Recommendation is made to the Honorable Edward C. Reed, Jr., Senior United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and the Local Rules of Practice, LR IB 1-4.

Before the court is Defendants' Motion for Summary Judgment (Doc. # 30). Plaintiff opposed the Motion (Doc. # 52), and Defendants replied (Doc. #62).

On or about August 1, 2005, Plaintiff Paul Recktenwald ("Plaintiff") filed an amended *pro se* Civil Rights complaint pursuant to 42 U.S.C. section 1983, alleging violations in three counts of his Eighth and Fourteenth Amendment Due Process Rights on the part of Ely State Prison, ("ESP") officials, Dr. Steven MacArthur, Warden E.K. McDaniels, Sgt. Jerry Bainbridge, Lt. John Messick, and Correctional Officers, Scott Evers and Delvin Gregerson. In Count I he alleges that Defendants McDaniels, Messick, and Bainbridge violated his Eighth amendment right to be free from cruel and unusual punishment for failing to protect him from food contaminated by other inmates and were deliberately indifferent to his medical needs. (Doc. # 9). Plaintiff withdrew Count II of his complaint, which removed his Fourteenth Amendment claim and Correctional Officers Evers and Gregerson from

1 the list of Defendants. (Doc. # 52, pg. 6). Count III of Plaintiff's complaint alleges that Defendant Dr.
2 MacArthur also violated Plaintiff's Eighth Amendment rights.

3 BACKGROUND

4 This case arises out of Plaintiff's incarceration with ESP. On March 26, 2006, Plaintiff, a
5 segregated population inmate, alleges that he suffered chemical burns to the mouth as a result of being
6 served contaminated macaroni and cheese ("mac and cheese") in the ESP mess hall by general
7 population inmates. (Doc. #9). He contends that all Count I Defendants are liable for this harm because
8 they failed to protect him from harm by other inmates. (*Id.*). Plaintiff argues that they were aware of
9 the general population's recurrent attempts to poison segregated inmates by contaminating their food.
10 (*Id.*). Count I Defendants contend however that Plaintiff is the only person who believes that the mac
11 and cheese served in the mess hall on March 26, 2004, was contaminated and that any prior alleged
12 incidents of food contamination are irrelevant to the day in question. (*See* Doc. #30). Defendant Lt.
13 Messick immediately investigated the situation and determined that the mac and cheese contained no
14 scent or flavor of bleach. (Doc. #30, Exh. E). Count I Defendants also contend that even if the mac
15 and cheese was contaminated on March 26, 2004, they are not liable to Plaintiff because none of them
16 had a duty to oversee the operations in the kitchen where the food was prepared, and thus could not
17 have known whether or not general population inmates tampered with the food. (Doc. # 30).

18 In Count III, Plaintiff alleges that Defendant Dr. MacArthur is liable to him for medical
19 deliberate indifference because he delayed treating Plaintiff's chemical burns which resulted in his
20 injury worsening to the point that it will have a lifetime effect on him. (Doc. # 9). Plaintiff did not see
21 Defendant Dr. MacArthur until ten days after he allegedly received chemical burns to his mouth. (*Id.*).
22 Plaintiff contends that this delay has caused him to develop a lisp and experience sensitivity to hot and
23 cold liquids which he did not have before he ate the mac and cheese. (*Id.*). Defendant Dr. MacArthur
24 contends that Plaintiff had to wait ten days because it was determined by the nightly pill call nurse on
25 the night of the incident that Plaintiff had cold sores and not chemical burns- thus his condition was
26 not as serious as those of other inmates who needed immediate medical treatment. (Doc. # 30, Exh.
27 F). Plaintiff did not visit the doctor again, regarding his mouth, until a year and a half after his
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1 appointment with Defendant Dr. MacArthur, when he was then incarcerated at a different institution
 2 (Doc. # 31, Exh. C1, pg. 8). Plaintiff's medical records subsequent to leaving ESP, reveal that he
 3 suffered from a condition named, hyperesthesia, which caused the abnormal feelings in his mouth.
 4 (Doc. # 31, Exh. C1). The medical records also reflect that three doctors, aside from Defendant Dr.
 5 MacArthur, agree that Plaintiff never suffered chemical burns to the mouth. (*Id.*).

6 DISCUSSION

7 A. Standard for Summary Judgment

8 The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as
 9 to the facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471
 10 (9th Cir. 1994). The moving party is entitled to summary judgment where, viewing the evidence and
 11 the inferences arising therefrom in favor of the nonmovant, there are no genuine issues of material
 12 fact in dispute and the moving party is entitled to judgment as a matter of law. Fed.R.CivP. 56(c);
 13 *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). Judgment as a matter of law is appropriate where
 14 there is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party.
 15 Fed.R.Civ.P. 50(a). Where reasonable minds could differ on the material facts at issue, however,
 16 summary judgment is not appropriate. *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995),
 17 cert. denied, 516 U.S. 1171, 116 S.Ct. 1261, 134 L.Ed.2d 209 (1996).

18 The moving party bears the burden of informing the court of the basis for its motion, together
 19 with evidence demonstrating the absence of any genuine issue of material fact. *Celotex Corp. v.*
 20 *Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). Once the moving party
 21 has met its burden, the party opposing the motion may not rest upon mere allegations or denials of the
 22 pleadings, but must set forth specific facts showing that there is a genuine issue for trial. *Anderson*
 23 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). Although
 24 the parties may submit evidence in an inadmissible form, only evidence which might be admissible
 25 at trial may be considered by a trial court in ruling on a motion for summary judgment. Fed.R.Civ.P.
 26 56(c); *Beyene v. Coleman Sec. Serv., Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988).

1 In evaluating the appropriateness of summary judgment, three steps are necessary: (1)
 2 determining whether a fact is material; (2) determining whether there is a genuine issue for the trier
 3 of fact, as determined by the documents submitted to the court; and (3) considering that evidence in
 4 light of the appropriate standard of proof. *Anderson*, 477 U.S. at 248, 106 S.Ct. at 2510. As to
 5 materiality, only disputes over facts that might affect the outcome of the suit under the governing law
 6 will properly preclude the entry of summary judgment. Factual disputes which are irrelevant or
 7 unnecessary will not be considered. *Id.* Where there is a complete failure of proof concerning an
 8 essential element of the nonmoving party's case, all other facts are rendered immaterial, and the moving
 9 party is entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2552-53.

10 In attempting to establish the existence of a factual dispute, the opposing party may not rely
 11 upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of
 12 affidavits, and/or admissible discovery material in support of its contention that a the dispute exists.
 13 Rule 56 (e); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n. 11 (1986). In
 14 resolving a summary judgment motion, the court examines the pleadings, depositions, answers to
 15 interrogatories, and admissions on file, together with affidavits, if any. Rule 56(c). Summary judgment
 16 is not a disfavored procedural shortcut, but an integral part of the federal rules as a whole. *Celotex*,
 17 477 U.S. at 323.

18 A. Count I- Deliberate Indifference to Inmates Health and Safety

19 In order to establish liability for failure to protect against harm an inmate must prove that the
 20 state official acted with "deliberate indifference" to his/her health or safety. *Farmer v. Brennan*, 511
 21 U.S. 825 (1994); *Berg v. Kincheole*, 794 F. 2d, 457 (9th Cir. 1986). A prison official is deliberately
 22 indifferent if he knows that an inmate faces a substantial risk of serious harm and fails to take
 23 reasonable measures to prevent it. *Farmer v. Brennan*, 511 U.S. 825, 837 (1994). The deliberate
 24 indifference standard requires a finding of some degree of "individual culpability." *Haygood v.*
 25 *Younger*, 769 F. 2d 1350, 1354-55 (9th Cir. 1985). A Plaintiff must set forth specific facts as to each
 26 individual Defendant's deliberate indifference, *Leer v. Murphy*, 844 F. 2d 628, 634 (9th Cir. 1988);
 27 *see also Berg v. Kincheloe*, 794 F. 2d 457, 460 (9th Cir. 1986); and prove that this indifference was
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1 the actual and proximate cause of Plaintiff's injury. *Id.* ; *see also* *Zatler v. Wainwright*, 802 F. 2d 397,
 2 400-01 (11th Cir. 1986); *Williams v. Bennett*, 689 F. 2d 1370, 1380-81 (11th Cir. 1986). A Defendant's
 3 conduct is the actual and proximate cause of Plaintiff's injury only if the injury would not have
 4 occurred "but for" that conduct. *See* W. Prosser & W. Keeton, *The Law of Torts* § 41, at 266 (5th Ed.
 5 1984); *see also* *White v. Roper*, 901 F. 2d 1501, 1505 (9th Cir. 1990).

6 Plaintiff alleges in Count I that Defendants McDaniel, Messick, and Bainbridge ("Count I
 7 Defendants") acted with "deliberate indifference" to his health and safety by failing to protect him
 8 from general population inmates who allegedly contaminated his food with bleach. (Doc. # 9). To
 9 prevail here Plaintiff must show that (1) Defendants knew he was at a serious risk of harm of which
 10 they ignored, and (2) that each specific Defendant actually caused the harm. To prove that Plaintiff was
 11 at a serious risk of harm he must show that the mac and cheese served to him at ESP was in fact
 12 contaminated. Plaintiff has not provided any proof in the form of affidavits or otherwise to show that
 13 the mac and cheese he received was indeed contaminated on May 26, 2004. *See* Rule 56 (c). Plaintiff
 14 alleges that Defendant Messick agreed that Plaintiff's food was contaminated with what seemed to
 15 bleach, however Defendant Messick declares that he was unable to find any trace of bleach on
 16 Plaintiff's tray, and that no other inmate complained of their food being contaminated or filed medical
 17 kites ¹. (See Doc. # 30, Exh. E, # 6 & 10). Furthermore, Plaintiff admits that he does not know of any
 18 other inmate that was also served mac and cheese on that day who complained of it smelling or tasting
 19 contaminated. (See Doc. # 30, Exh. A, pg. 28. ll.1-9).

20 Plaintiff also alleges that all Count I Defendants were aware of the mac and cheese being
 21 contaminated because contaminating segregated inmate's food was a common practice done by general
 22 population inmates. (Doc. # 9). Plaintiff provides affidavits, letters, and newspaper clippings related
 23 to past incidents of food contamination to support his position that this was a common practice at ESP
 24 and thus Defendants should have taken precautions to prevent the mac and cheese being contaminated

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 26 ¹ Defendant Messick conducted an investigation along with the Culinary Supervisor, Roy Williams, who
 27 supervised the general population inmates in the kitchen and found the mac and cheese to be fine. As a precaution,
 28 Defendant Messick allowed those inmates who were concerned about Plaintiff's complaints to get a new tray of mac
 and cheese. (Doc. #30, Exh. E, #16).

on May 26, 2004. (See Doc. # 52). However, rule 56 (e) requires that affidavits be based on personal knowledge and set forth facts able to be admitted into evidence. Plaintiff's supporting documents are improper because they are based on other alleged incidents of food contamination many years prior and completely unrelated to the alleged contamination of Plaintiff's food. Without evidence of Defendants' knowledge of food contamination on the day in question, there is no genuine issue as to whether or not Defendants knew that Plaintiff was at a serious risk of harm of which they ignored.

Looking at the evidence in the light most favorable to the Plaintiff the court can only conclude that the mac and cheese was not contaminated. Even if the mac and cheese was contaminated, Plaintiff has failed to establish that Defendants had knowledge of the contamination of which they failed to do anything about. Defendants' Motion for Summary Judgment should be granted as to Count I.

1. Theory of *Respondeat Superior* and Defendant Warden McDaniel.

Even if Plaintiff was able to prove that his food was contaminated and that the other Count I Defendants knew about it but failed to prevent Plaintiff from eating it, his claim against Defendant McDaniel in his supervisory capacity would be void under a theory of *respondeat superior*.

In *Fayle v. Stapley*, 607 F. 2d 858, 862 (9th Cir. 1979), the Ninth Circuit established that supervisory personnel are not liable under § 1983 for the actions or inactions of their employees under a theory of *respondeat superior*. See also *Mosher v. Saalfeld*, 589 F. 2d 438, 441 (9th Cir. 1978). Thus, it is unnecessary to discuss whether the facts alleged give rise to a cognizable legal claim under the Eighth Amendment because Plaintiff's claim against Defendant wardens as supervisors fails on its face under the theory of *respondeat superior*.

B. Count III- Medical Deliberate Indifference and Defendant Dr. Mc Arthur.

In order to prevail on an Eighth Amendment violation for delay in medical care, Plaintiff needs to prove that Defendant Dr. MacArthur was deliberately indifferent to a serious medical need of which he knew existed. *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), 2007 U.S. LEXIS 6814; quoting *Estelle v. Gamble*, 429 U.S. 97 (1976); see also, *Wilson v. Seiter*, 501 U.S. 294, 297 (1991). "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are serious." *Hudson v.*

1 *McMillan*, 503 U.S. 1, 9 (1992). A serious medical need exists if the failure to treat a prisoner's
 2 condition could result in further significant injury or the unnecessary and wanton infliction of pain.
 3 *Erickson*, 127 S. Ct. at 2197; *see also, McGuckin v. Smith*, 974 F. 2d 1050, 1060 (9th Cir. 1992);
 4 *quoting, Estelle*, 429 U.S. at 103. An injury is significant injury when a reasonable doctor or patient
 5 find it worthy of comment or treatment; when it significantly effects an individual's daily activities;
 6 or when it is accompanied by chronic and substantial pain. *Id.* at 1059-1060. The seriousness of a
 7 prisoner's medical need and the doctor's response to that need must be established before attempting
 8 to find deliberate indifference. *McGuckin*, 974 F. 2d at 1060.

9 1. Serious Medical Need

10 In Count III, Plaintiff alleges that Defendant MacArthur delayed treating him for chemical burns
 11 to the mouth and refused to give him pain medication which caused unwanted pain and subsequent
 12 scarring in his mouth. (Doc. # 9). Plaintiff submitted a medical kite requesting medical treatment at
 13 10:42 p.m., on May 26, 2004, in which he wrote the question, "how long will this chemical burn last?"
 14 (Doc. # 30, Exh. F, 4.). Plaintiff was not seen by Defendant Dr. MacArthur until 10 days later on June
 15 4, 2004. (Doc. # 30, Exh. F). Defendants argue that this delay was because Plaintiff did not request to
 16 see a doctor in his May 26th medical kite and because it was determined by two nurses on three separate
 17 occasions, before seeing Defendant Dr. MacArthur, that Plaintiff had cold sores not chemical burns.
 18 (*Id.*, *see* Exhs. F-H). Thus, Plaintiff was placed on routine medical call, and when he was seen by
 19 Defendant Dr. MacArthur on June 4, 2004, it was confirmed that the abnormalities in his mouth were
 20 in fact cold sores². (*See Id.* Exh. F, & Doc. #31, Exh. C2). Plaintiff argues that because Defendant Dr.
 21 MacArthur wrote in Plaintiff's chart that Plaintiff complained of chemical burns, he treated Plaintiff's
 22 ailment as such. (*See* Doc. # 31, Exh. C2, pg. 2). But Defendant Dr. MacArthur opined that had
 23 Plaintiff suffered chemical burns from ingesting food contaminated with bleach, objective evidence
 24 would have existed on his June 4, 2004, examination. (Doc. #30, Exh. F).

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 27 ² Routine medical call means a prisoner will be seen within two weeks of his complaint depending
 28 on the immediate needs of other prisoners. (Doc. # 30, Exh. F).

1 Plaintiff also alleges that the ten day delay by Defendant Dr. MacArthur to treat him and his
2 refusal of further medical treatment for Plaintiff while at ESP was an unnecessary and wanton infliction
3 of pain and the cause of his injury worsening to the point that he now has developed a lisp and
4 sensitivities to hot and cold liquids. (Doc. #60, pg. 5). But Plaintiff did not request further treatment
5 for his mouth in his remaining year and a half at ESP, thus Defendant Dr. MacArthur could not have
6 wantonly inflicted unnecessary pain upon Plaintiff- because he never refused him treatment. (See Doc.
7 #31, Exh. C1, pg. 6). Furthermore, the declarations by three Nevada Department of Corrections
8 ("NDOC") physicians and the medical report prepared by the NDOC reflect that Plaintiff has a
9 condition known as hyperesthesia which caused his mouth problems- the director who prepared the
10 report specifically stated that no physician who treated Plaintiff believed he had chemical burns in his
11 mouth. (Doc. #31, Exh. C1, pg. 14, also *see* Doc. #30, Exhs. J & K). Because a substantial amount of
12 medical documentation exists to show that Plaintiff did not suffer chemical burns to the mouth, there
13 is no issue of material fact that Dr. MacArthur was deliberately indifferent to Plaintiff's serious medical
14 needs. Defendants' Motion for Summary Judgment should be granted as to Count III.

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RECOMMENDATION

IT IS HEREBY RECOMMENDED that the District Court enter an order **GRANTING** Defendants' Motion for Summary Judgment (Doc. # 30), and dismiss Plaintiff's claims with prejudice.

The parties should be aware of the following:

1. That they may file, pursuant to 28 U.S.C. § 636 (b)(1)(C) and Rule IB3-2 of the Local Rules of Practice, specific written objections to this Report and Recommendation within ten (10) days of receipt. These objections should be titled "Objections to Magistrate Judge's Report and Recommendation" and should be accompanied by points and authorities for consideration by the District Court.

2. That this Report and Recommendation is not an appealable court order and that any notice of appeal pursuant to Rule 4(a)(1) of the Federal Rules of Civil Procedure, should not be filed until entry of the District Court's judgment.

DATED: August 6, 2007.



UNITED STATES MAGISTRATE JUDGE